In the Matter of Arbitration

between

U. S. DEPT. OF ENERGY
Oak Ridge Operations Office

and

OFFICE AND PROFESSIONAL
EMPLOYEES
INTERNATIONAL UNION
AFL-CIO
Local 268

Grievants:
[Deleted to protect privacy]

FMCS Case #98-04545
Denial of Use of Credit Hours

Date Hearing Held:
March 27, 1998
Date Last Brief Received:
May26, 1998
Date of Award:
June 15, 1998

BEFORE: JOHN R. CANADA, ARBITRATOR

APPEARANCES:

For DOE
Robert E. James, Attorney
Office of Chief Counsel, Oak Ridge Operations Office
U.S. Department of Energy, P.O. Box 2001
Oak Ridge TN 37831

For Union:
Phillip R. Pope, Business Representative
OPEIU, Local 268
411 S. Gay Street, Suite D
Knoxville, TN 37919

AWARD:

Grievances are denied. The employer does have the right to restrict the use of credit hours through its supervisory approval process.

John R. Canada. Arbitrator
June 13, 1998

Grievants: [Deleted to protect privacy. Denoted herein as Grievant A and Grievant B]

Hearing March 27, 1998

I. ISSUE

As Stated by Union:

> Did the employer violate the Labor Agreement (MOA dated 411197) or the law when they discontinued the practice of allowing employees to earn credit hours and use such credit hours so as to work a four day schedule.

As Stated by Employer:

> Whether DOE management properly restricted the use of credit time by [grievants] because of workload considerations.

As Framed by This Arbitrator:

> Did the employer violate Agreement Section 28 with amendments as stated in the MOA dated 4/l/97 by restricting the use of credit hours; if so, what shall be the remedy?

II. WITNESSES

For Union

> Nancy Fitzpatrick [sic], Chief, Financial Systems (adverse)
> Mirek Halaska, Team Leader, Planning and Budget (adverse)
> [Grievant A]
> Jeanette Miller, Management Analyst
> [Grievant B]
> Dalton Cooper, Union Representative and Shop Chairman
> Delores Henry, Management Analyst

For Employer

> Jenifer Hackett, Director, Planning and Budget
> Jim Martin, Director, OR Financial Services Center
> Judy Penry, Chief Financial Officer
> Lois Jago, Chief, Personnel Management and Analysis Branch
> Nina Boyer, Personnel Management Specialist

III. BACKGROUND

The Agreement (Jt.Ex.#l) between the Oak Ridge Operations Office ("ORO") and the Office of Scientific and Technical Information ("OSTI,") of the U.S. Department of Energy ("DOE"), referred to collectively as the "Employer", and the Local No. 268 of the Office and Professional Employees International Union ("OPEIU"), referred to as the "Union" was published in December 1995. Article 28 contained the agreed description of"Altemate Work Schedules", describing how bargaining unit employees GS-13 and below may choose to work a variable week schedule, flextime, or a regular tour of duty.

The last paragraph of Article 28 said:

> "The parties agree that this Article will be re-opened after one year of operations under the variable week schedule for the limited purpose of negotiations with regard to the 4-10 Alternate Work Schedule"

Those negotiations were re-opened and, with the assistance of the Federal Services Impasses Panel, A Memorandum of Agreement (MOA) dated April 1, 1997 (DOE Ex.#5 and Union Ex.#6) was signed by the parties stipulating numerous changes but not specifically stating that the 4-10 (4 days/week, 10 hours/day) Alternate Work Schedule was now one of the options.

The Union thought that the MOA changes, especially regarding credit hours, had resulted in employees gaining the right to work 10-hour work days without supervisor approval (Un.Ex.#4), and thus to be able to use four 10-hour work days to fulfill the requirement for a 40-hour work week. At least several supervisors/managers strongly felt that routine, recurring use of credit hours to accomplish 4-day work weeks each week was not acceptable, citing workload considerations, particularly during "crunch periods".

While the grievances cited involved denials of requests by [Grievant A and Grievant B], it was testified that there had been at least several other such denials. There were no procedural objections, and it was agreed that this issue was properly before the Arbitrator.

IV. POSITION OF UNION

The Union first pointed out that in 1995 the parties successfully negotiated a variable work week schedule (VWS), which allows employees to arrange their schedule so that they could be off of work one day per two week pay period. The work schedule is determined by the employee, not the employer, as long as the work is performed within certain hours (core hours) and totals 80 hours per pay period.

Union officials testified that when the MOA was signed on April 1, 1997 (Un.Ex.#6), they had no doubt it would allow employees to be able to work a four day schedule each week (off two days per pay period) by virtue of first earning and then using earned credit hours. They strongly felt it meant employees would be able to work 10-hour days without supervisor approval and thus built up hour credits which can then be used to not work one day/week if desired.

[Grievant A] testified that he was denied his request to effectively work the 4-10 schedule by use of credit hours even though he was willing to take off on Wednesdays to alleviate possible disruption at the office, and even though he has to drive 60 miles each way each day he comes to work. [Grievant B] testified similarly, but she wanted to take off for 3-day weekends because her home is 120 miles from work.

Both grievants testified that their respective supervisors reflected dislike for the 410 work schedule as articulated by the Chief Financial Officer (CFO) to whom the supervisors report. Other testimony affirmed that the CFO was opposed to approval of employees taking off one work day/week on a routine and recurring basis.

The Union asserted that Federal Law 5 USC Section 6131 (Un.Ex.#29) requires management to follow certain procedures to begin the process of elimination of a flexible work week schedule. It negotiated the MOA of April 1, 1997 with the assistance of the Federal Services Impasses Panel and for six months employees enjoyed the extra flexibility. It detailed some five requirements of the law impeding the Employer from eliminating schedule flexibility which has already been granted.

Regarding the Union Newsletter of April 3, 1997 (Un.Ex.#27) announcing that the Union had successfully negotiated a 10 hour work day, the Union Advocate stated that the Newsletter had to be approved by management, namely Ms. Boyer or Ms Jago, before such mailing was sent. The second paragraph of this management-approved Union Newsletter says:

> "Although the enclosed agreement is not called a 4-10 schedule, employees will be allowed to work a 10-hour day without supervisory approval"

The Union strongly asserted that for the employer to allow employees to work 10 hours per day, no more than 80 hours in a two week pay period, and to deny the use of those credit hours is a blatant violation of the negotiated Agreement, a violation of the law, a violation of past practices that existed from April 1997 until September 1997, and a back door attempt to take away what they gave their employees at the conference between the parties resulting in the MOA of 4/1/97.

The Union maintained that DOE Ex.#5 (ORO 340 on the Alternative Work Schedule Program) should be discredited. Pages 2 and 3 were revised on 6/12/97, presumably to reflect the MOA of 4/1/97, and most significantly included a sentence stating that

> "Approval must be obtained in advance for the use of credit hours unless the circumstances leading to the use of credit hours prevent an employee from obtaining such advance approval".

The reason for discrediting the above is that the Union didn't receive the revised order. Article 9, Section 8 (pg 9) of the Agreement requires Management to send three copies of DOE orders to the Union. Yet the only attempt to provide this was by E-mail on 6/16/97. However on 5/7/97, at Management's request, the parties had signed a MOA agreeing that formal communications would not be sent by E-mail. The Union claimed that it did not see the revised order (DOE Ex.#5) until the day before this Hearing.

In summary, the Union asked that the right to earn and use credit hours be restored to employees, even if it does not allow employees to have a four day work week, five day and three day work weeks, or any other combination as guaranteed under Section 1 .A.7 of the MOA of April 1, 1997. It also asked that all affected employees be awarded reimbursement of their additional mileage at the rate of 31 cents per mile for having to travel to work additional days and any other costs associated with having to drive to work additional days.

V. POSITION OF EMPLOYER

The employer maintained that the denial of use of credit hours by the grievants was properly exercised by management in both grievant cases per statutory and contractual rights that have not been bargained away.

Per Federal Statute 5 U.S.C. §6122, the idea of “flexible schedule” was recognized to allow the earning and use of credit time. However, per 5 U.S.C. §6130 (a), a Federal agency may restrict the use of credit hours to prevent substantial disruption in the workplace. The employer strongly asserted that this amended provision in Article 28, Section 1.A.6 means employees may earn up to 2 hours per day of credit time without supervisory approval, but the Agreement's requirement for supervisory approval of credit time use was unaffected.

The Employer argued strongly that the Union's contention, that the execution of the MOA without specifically mentioning its authority to restrict credit time use constituted a waiver of that authority, was invalid. Also, it argued that its restrictions on [Grievant A’s] and [Grievant B’s] credit time use were based on valid workload considerations and concerns about workplace disruption, and are consistent with DOE's statutory authority.

The Employer further argued and cited cases backing the general principle that the contractual waiver of a statutory right under Federal labor law must be clear and unmistakably expressed. It asserted that the Employer has never clearly and unmistakably waived its right to restrict the use of credit hours, and there was no testimony or document to show such a waiver.

The Employer showed that seven days after the MOA it executed a memo explaining work

schedule changes (DOE Ex.#6). That memo specifically states in paragraph 2, "The supervisor's decision to approve or disapprove use of credit hours will be based on a determination that an appropriate level of work coverage can be maintained on the day requested." It contended that the Union was afforded the opportunity to review and comment on the memo (and the April 11 revision) prior to its release. This contention was backed by Co. Ex.#23 which was a draft of the above memo containing the same relevant wording re approval of use of credit hours together with a cover letter and notations to show that the draft was presented to the Union at a meeting on April 8, 1997.

In summary, the Employer asked that the grievances of [Grievant A and Grievant B] be denied in full, and that its position should be affirmed that supervisory approval of credit time usage is required.

VI. DISCUSSION AND OPINION

This was a very strongly contested case, with the Hearing lasting some 10 hours. The closing briefs submitted by both advocates reflected outstanding thoroughness. There were some 24 exhibits submitted by the Employer and 30 exhibits submitted by the Union. Those are not listed herein, but the 12 total witnesses called are listed in Section II (above).

This case boils down to whether the MOA dated April 1, 1997 completely replaces the applicable, stated sections (sub-sections) in Agreement Article 28, Section 1.A. After careful consideration, I must conclude that it does not. The MOA clearly says that the Agreement "is amended as follows:" (underlining supplied).

While most of the amendments are clear and reflect that the Union did negotiate greater freedom in choosing alternate work schedules and in earning credit hours, it must be deemed that they fell short of providing employees the right to routinely and repetitively use these credit hours so as to be off from work two days per pay period without supervisory approval. The most critical provision was Amendment Article 28, Section 1.A.6, which reads:

> "Supervisory approvals required for earning/using credit hours based on work requirements. Earning of credit hours will be based on management's determination of available work".

The MOA sub-section which amends the above reads:

> "Upon notification to the supervisor, each employee GS-13 and below will be afforded the opportunity to work up to 2 credit hours per day if there is work (a form will be attached)."

The original sub-section called for supervisory approval for both earning and using credit hours. The new (amended) sub-section addresses only changes in approval required for earning up to two credit hours per day. It is silent regarding using credit hours. Since it is an amendment, it must be concluded that the requirement for supervisory approval for use of credit hours remains the same.

Even though this is a tough call on a matter of apparent great importance to the Union, it is backed by the general principle that the contractual waiver of a statutory right under Federal labor law must be clearly and unmistakably expressed. In this case, there was no testimony or document

presented to show such a waiver.

Having denied the above, the other arguments by the Union, though well expressed, become moot. For example, the employer didn't eliminate any flexibility compared to the original Article 28. Also, when an employee knows/learns that he or she cannot use or carry over certain credit hours, then he should, himself, know automatically that it would be “futile” for him to earn those credit hours.

It is hoped that management still will let employees desiring to schedule their work 8 days per pay period do so when that does not reduce the effectiveness of the organization. In any case, employees still can work 9 days per pay period on a routine basis under the Variable Week Schedule.

John R. Canada, Arbitrator
Award, June 13, 1998

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